No. 415.

Brief of Pentecost for P. E.

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Supreme Court of the United States.

OCTOBER TERM, 1897.

No 415.

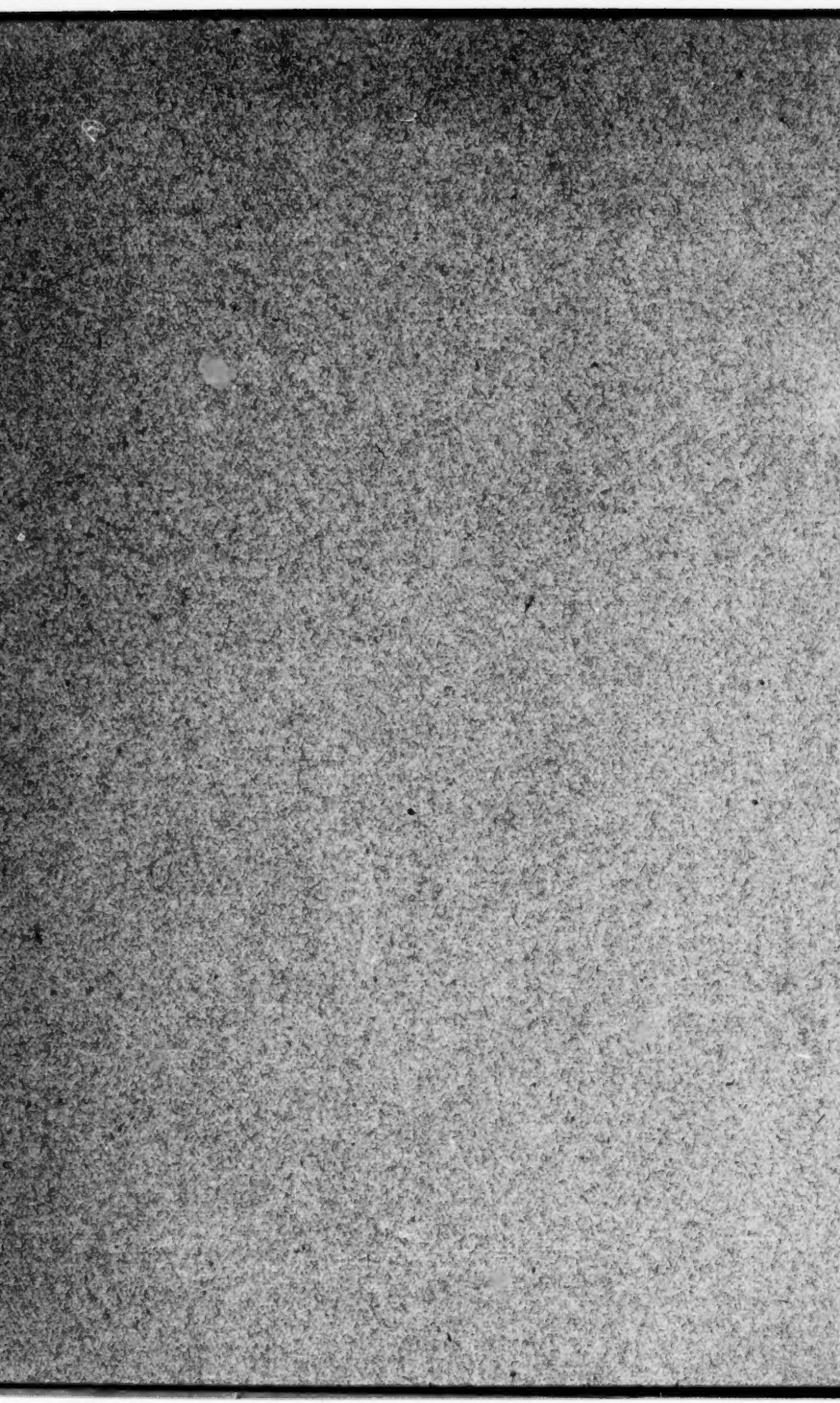
BENJAMIN HAWKER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANT IN ERROR.

HUGH O. PENTECOST,
Attorney for Plaintiff in Error.

Press of Pusey & Troxell, 123 W. 42d Street



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Supreme Court of the United States.

OCTOBER TERM, 1897.

BENJAMIN HAWKER,
Plaintiff in Error,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error,

No. 415.

Brief for the Plaintiff in Error.

Statement.

This is ~~an appeal~~ a writ of error by Benjamin Hawker, the plaintiff herein, from a judgment rendered by the Court of Appeals of the State of New York on March 16, 1897, reversing a judgment of the Supreme Court (First Department) of the State of New York, rendered against the defendant in error on February 5, 1897, dismissing the indictment against the plaintiff and discharging him from custody.

The plaintiff, Benjamin Hawker, was indicted by the Grand Jury of the City and County of New York on the 27th day of March, 1896, in two cases, in each of which plaintiff is charged with having violated Chap. 661 of the Laws of 1893, as amended by Chapter 398 of the Laws of 1895, in having practiced medicine

after conviction of a felony. Plaintiff was arraigned at the bar of the Court of General Sessions of the Peace, in and for the City and County of New York, in Part I thereof, for pleading, on the 7th day of April, 1896, at which time and place instead of pleading, plaintiff demurred to said indictments, on the ground that the facts stated therein do not constitute a crime, in that the statute alleged to have been violated is prospective in its application; or else, if it is not prospective in its application, it is null and void, as being in violation of Art. I., Sec. 10 of the Constitution of the United States, and of the fifth and fourteenth (Sec. 1) amendments to said Constitution, and also of Article I., Secs. 1 and 6 of the Constitution of the State of New York. The aforesaid indictments were discovered to be defective, in that they charged plaintiff with having committed a felony, and they were superseded by two other indictments, filed on the 30th day of April, 1896, in which said defects were cured. The demurrer previously interposed was allowed to apply to these said latter indictments, and, after argument, was disallowed by FITZGERALD, J., on the 23d day of July, 1896. On July 27th, 1896, plaintiff pleaded not guilty, and on September 17th, 1896, he was tried before the HON. JAMES FITZGERALD and convicted. On the same day judgment was pronounced upon plaintiff, and Judge FITZGERALD granted a certificate of reasonable doubt and admitted plaintiff to bail, pending appeal.

On the trial of the plaintiff no witnesses were examined. Plaintiff admitted to be true all the facts alleged in the indictment on which he was tried, and moved for a dismissal of the indictment, and that the jury be advised to acquit, on the grounds already set forth in the demurrer herein.

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POINT. I.

In practicing medicine, as alleged, after having been convicted of a felony, as alleged, defendant committed no crime.

First. *The statute should be construed prospectively.*

Plaintiff was indicted under Chap. 661 of the Laws of 1893, as amended by Chap. 398 of the Laws of 1895. In so far as these statutes bear upon the charge against plaintiff, the language is as follows:

> Any person who, after conviction of a felony, shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor, etc. (Ch. 398, Laws of 1895).

It is a fundamental rule in construing statutes so worded as to admit of a construction which would render them retrospective as well as prospective, that a prospective construction is given, unless a legislative intent to the contrary be declared, or necessarily implied from the circumstances or the language used (Am. and Eng. Enc. of Law, vol. 23, p. 448).

Amsby vs. Hinds, 48 N. Y., 57.
Johnson vs. Burrell, 2 Hill, 238.
Fairbanks vs. Woods, 17 Wend., 329.
Wood vs. Oakly, 11 Paige, 400.
Quinn vs. New York, 63 Barb., 595.
Wilson vs. Baptist Education Soc., 10 Barb., 308.
Quackenbush vs. Danks, 1 Den., 126; 1 N. Y., 129.

There is nothing in the language of said statutes from which it must necessarily be implied that the

legislature intended them to be retrospective in their application.

The felony which it is charged this plaintiff committed prior to his practicing medicine in the year 1896, is alleged to have been committed in the year 1878—*fifteen years* previous to the passage of Chap. 661, Laws of 1893, and *seventeen years* previous to the amendment of that chapter in 1895, and nearly *eighteen years* previous to the indictments herein.

We are not to suppose, without good ground for doing so, that the Legislature of this State intended to deprive this defendant of his means of earning a living *as a penalty for a crime* committed and expiated many years ago, unless something in the language of the statute positively compels us to take that view of the case.

Another rule of interpretation and construction of statutes is that wherever a statute is capable of two constructions, one of which would work manifest injustice, and the other would work no injustice, it is the duty of the Court to adopt the latter, as it can scarcely be presumed that an injustice was within the legislative intent.

This rule is also too well known and too manifestly reasonable to require authorities in its support. We shall, therefore, content ourselves with referring to the case of Lau Ow Bew vs. United States, 144 U. S., 47, in which Chief Justice FULLER, delivering the opinion of the Court, said:

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an injustice and absurd conclusion.

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The injustice of construing Sec. 398, Laws of 1895, retrospectively will be apparent by supposing a case which might easily come under its provisions; for example: It may well have happened twenty years ago that a college student in a sudden quarrel with a classmate might have assaulted him with an instrument calculated to do serious bodily harm; and, thereafter, might have been convicted of a felonious assault; and, thereafter, might have been discharged from custody by the Court under a suspension of sentence; and, thereafter, might have finished his college course and a medical course, and have become a medical practitioner, and have achieved great and deserved distinction in his profession, he being none the less a good citizen and a safe and reliable medical practitioner because of the circumstances which made him a felon in his early youth. If the statute now in question is to be construed as of retrospective application, such a distinguished member of the medical profession would be obliged to cease practicing or subject himself to a prosecution for misdemeanor.

The case supposed is not improbable, and should it arise under the law now in question, every sensible person would see the injustice and absurdity of a construction of the law which would result in depriving the community of the services of an eminent physician, and of depriving such a physician of his means of livelihood on account of a youthful indiscretion, committed many years before the law was passed. It was said by Judge EARL, in Stewart vs. Palmer (74 N. Y., 183), that "the constitutional validity of a law is to be tested, not by what has been done under it, but by *what may by its authority be done.*"

Second. *If said law is construed retrospectively, then it is null and void, because it is in conflict with the Constitution of the United States.*

Art. I., Sec. 10, of the Constitution of the United States forbids any State to pass

> any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts:

and the fifth amendment to said Constitution provides that

> no person shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law;

and these last provisions are embodied in the Constitution of the State of New York.

If Chapter 661, Laws of 1893, as amended by Chapter 398, Laws of 1895, is construed to be as of retrospective application, then this law is:

I. *An ex post facto law.*

A definition of an *ex post facto* law, which has ever since been substantially adopted, was given by CHASE, J., in Calder vs. Bull, 3 Dall. (U. S.), 386, and is as follows:

> FIRST. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.
>
> SECOND. Every law that aggravates a crime and makes it greater than it was when committed.

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> THIRD. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.
>
> FOURTH Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offense in order to convict the offender.

The law in question in this case, if construed retrospectively, is *ex post facto* in that it "aggravates a crime and makes it greater than it was when committed," and in that it "changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."

At the time when this defendant committed the felony alleged, it was not punishable by depriving him of the right to practice his profession in addition to serving a term in prison. The Legislature now enacts, years after he has paid his debt to the State, that he shall be still further punished for his crime by being deprived of his right to practice his profession; and that without trial. He is supposed by this law to cease practicing his profession, and thereby sit in judgment upon himself by thus making confession of his guilt.

It cannot be successfully claimed that the deprivation of the means of earning a living in the only manner known to this defendant is not a punishment. It is a punishment far greater, indeed, than that which he suffered by imprisonment for his crime as alleged in the indictment herein. This question has been settled by the opinion of Mr. Justice FIELD, in Cummings vs. The State of Missouri, 4 Wall., 321, in which, with many other things on the same subject, he says:

> The theory upon which our political institution rose is that all men have inalienable rights;

> that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Cummings, the defendant-appellant in that case, had been convicted in a trial Court for preaching the Gospel without taking an expurgatory oath prescribed by the Constitution of Missouri soon after the late Civil War.

The oath was to the effect that the person taking it had not been guilty of treason, etc., during the war, and the taking of the oath was a condition of holding public office, teaching school, practicing law, preaching the gospel, etc. The law requiring a person to take the oath or abandon his profession was declared unconstitutional by the U. S. Supreme Court, on the ground, among others, that the deprivation of rights involved in it was not a penalty for treason at the time the treason was committed, and, that, therefore, it was adding a punishment which did not attach to the crime when committed. This is exactly the situation in the case at bar, and the same reasoning holds.

It is not denied that the State has the right to prescribe the qualifications of practicing physicians in any manner necessary to protect the public from incompetent or dishonorable practitioners. It is not denied that the law under which this indictment is drawn may be good if it is construed prospectively. The Legislature may enact that any person convicted of a felony, or of certain felonies, subsequently to a given date must not thereafter practice medicine. That would put possible criminals on their guard. That

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would attach to felony, or to certain felonies, a punishment which it did not have before; and persons tempted to commit a felony, or certain felonies, would have to take that new punishment into account. But the Legislature has not the right to enact to-day that a person who committed a felony twenty years ago shall be deprived of a right which that felony did not deprive him of when it was committed. Citizens have a right to know exactly what penalty they must or may suffer if they commit a crime. That knowledge is presumably taken into account when they commit crimes. But they cannot know what the penalty for crime is if, twenty years after conviction, the Legislature can visit new and different punishments upon them.

If the law in question herein is construed retrospectively:

II. *It deprives the defendant of liberty and property without due process of law.*

The National Constitution forbids the passing of laws which deprive the citizen of life, liberty or property without due process of law. Liberty involves the idea of exercising one's powers and functions in any legitimate business, and property is any possession, material or immaterial, which has a money value. A physician's practice is just as much property as a nugget of gold or palace of marble. It is sometimes his only property. His competency to practice and his *clientele* are his capital, his stock in trade, his property, equally as if they were gross material things. But this law, construed retrospectively, strips him of both liberty and property at one fell sweep, without due process of law. There is no complaint, no examination, no confronting with witnesses, no trial, no jury, no judge. The Legislature becomes judge and jury,

and deprives him of everything but life, and, perhaps, in the end, of that, by annexing a new, strange and awful punishment to a crime committed and atoned for nearly twenty years ago. Mind and heart, reason and moral sense, recoil from such a situation. Even the elastic police power of the State cannot be stretched to such a length as this. If it could be, the Supreme Court of the United States would not have declared to be unconstitutional those sections of the Missouri Constitution which prohibited Confederate soldiers and Confederate sympathizers from teaching, preaching and practicing law in that State (4 Wall., 277-399).

Bertholf vs. O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
Livestock Association vs. Crescent City, etc., Co. (1 Abb. U. S. 388, 398).
Slaughter House Cases (16 Wall. 36, 106).
People vs. Marx (99 N. Y., 377).
Webster's Works, Vol. V., p. 487.
Dartmouth College Case, 4 Wheat., 519.
People vs. Gillson, 109 N. Y., 398, 399, 400, 401, 404.
Mugler vs. Kansas, 123 U. S., 661.

The court below held that this case does not show any deprivation of liberty or property for the reason that it appears nowhere in the record that the plaintiff in error is or ever was a regularly graduated physician. To this it may be replied that under the indictment herein that fact (which would be readily conceded by the respondents) could not have been proven; but, even so, the question here is not only one of deprivation of liberty and property, but of an *ex post facto* law. If the law in question here, when construed

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retrospectively, is unconstitutional, that is sufficient to warrant a judgment in favor of the plaintiff in error. The question we are seeking to have determined is not whether this plaintiff is a physician or not, but whether the law under which he is now under conviction is constitutional or not.

The Case of Dent vs. West Virginia.

In defendant's brief stress is laid on Dent vs. West Virginia, 129 U. S., 114. This case is not in point in the case at bar. Defendant in Dent vs. West Virginia was prosecuted to a conviction under a statute the sole purpose of which was to insure professional competency in a physician. Said statute required, in substance, that a practicing physician must have a diploma from a reputable medical college, or must have practiced medicine in said state continuously for a period of ten years prior to a given date, or must submit to an examination before a state board of health. Defendant (Dent) was prosecuted to a conviction for practicing without a diploma, as aforesaid, and without having practiced ten years, as aforesaid, or having passed an examination, as aforesaid. The United States Supreme Court properly affirmed the judgment against Dent on the principle that

> the power of the state to provide the general welfare of its people authorizes it to prescribe such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud (p. 122).

The Court goes on to say:

> The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession or are unattainable by such reasonable study and application that they can operate to deprive one of his right to pursue a lawful vocation (p. 122).

It will be observed that the Court announces a principle favorable to the plaintiff in the case at bar when it says "that the nature of the qualifications of a physician required by the state must be appropriate to the calling or profession and *attainable by reasonable study or application;*" and when it says further that when such required qualifications "have no relation to such calling or profession or are *unattainable by such reasonable study or application*" it is beyond the constitutional province of the state to prescribe them.

Dent "by reasonable study or application" could meet the requirements of the statute in his case, but in the case at bar the statute requires what this defendant "by reasonable study or application" could not attain.

It is believed that the only cases bearing upon the questions now in issue are the following:

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Cummings vs. Missouri, 4 Wall., 277.
Ex parte Garland, 4 Wall., 333.
Ex parte Tenny, 2 Duv. (Ky.), 351.
Ex parte Law, 35 Ga., 285.
Matter of Dorsey, 7 Port (Ala.), 293.

and some other cases which have followed the first two of the foregoing; notably

Greene vs. Shumway, 39 N. Y., 418.

In conclusion, the Court is respectfully referred to Cummings vs. The State of Missouri and to *Ex parte* Garland, 4 Wall. (U. S.), 277-399, and to Greene vs. Shumway, 39 N. Y., 418, which cases are on all fours with the case at bar, and in which the questions involved herein are fully discussed by eminent counsel on either side and by the Court.

The indictments herein should be dismissed and the plaintiff discharged, for the reason that if the law under which they were drawn is prospective the plaintiff has not violated it; but if the law is retrospective it is null and void for unconstitutionality.

Respectfully submitted.

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